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IN THE

# Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
*Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] Letters of consent from the parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and, thus, supports the position of the petitioner, Eastern Associated Coal Corporation.

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound programs to end employment discrimination. Its membership now includes more than 325 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States.

EEAC's members all are employers covered by the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* Many have collective-bargaining agreements and regularly use arbitration processes to settle employment-related issues. EEAC strongly supports arbitration as a means of resolving workplace disputes and has filed *amicus* briefs supporting enforcement of arbitration agreements in numerous cases. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391 (1998).

EEAC's members are concerned, however, about arbitration awards—like the one in this case—that clash with important public policies, such as the policy that favors keeping known drug-abusers out of safety-sensitive jobs. Most EEAC members are government contractors subject to the Drug Free Workplace Act of 1988, as amended, 41 U.S.C. § 701. Many also are subject to laws designed to eliminate drug use in specific industries, such as commercial motor transportation, 49 U.S.C. § 31306, rail transportation, 49 U.S.C. § 20140, maritime transportation, 46 U.S.C. § 7702(c)(2), and the civil space program, 42 U.S.C. § 2473c. Accordingly, most EEAC members have drug-free workplace programs that include strong anti-drug policies backed up by training, counseling, and strict penalties for violations.

EEAC members are concerned that affirmance of the Fourth Circuit's decision in this case—which upholds enforcement of

an arbitrator's award directing an employer to reinstate a man to a job driving 55,000 pound vehicles on public roads after he had twice failed random workplace drug tests—would subvert their drug-free workplace programs and contravene the public policies on which those programs are based.

EEAC members also are concerned that affirmance of the decision below could weaken and undercut other employer programs grounded in important public policies, including programs to eliminate unlawful workplace harassment. As employers, EEAC members are, of course, subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and other laws against job discrimination and harassment based on sex, race and other protected characteristics. In keeping with those laws, and with the decisions of this and other courts, EEAC members have adopted harassment-free workplace programs that, like their drug-free workplace programs, include strong policies backed by training, counseling, and strict penalties. As discussed in the Argument that follows, several courts have vacated, as against public policy, arbitration awards ordering reinstatement of employees found to have engaged in workplace sexual harassment. EEAC members are concerned that supportive court decisions such as these—and, with them, the credibility of employers' harassment-free workplace programs—could be cast in doubt if this Court were to uphold the Fourth Circuit's reasoning in this case.

## STATEMENT OF THE CASE

The petitioner, Eastern Associated Coal Corporation ("the Company"), is a mining company bound by a collective-bargaining agreement with the respondents (collectively, "the Union"). The agreement authorizes the Company to discharge employees for "just cause," subject to a grievance and arbitration process.

The Company employs a road crew to maintain its mine haulage roads. Crew members known as Mobile Equipment Opera-

tors ("MEO's") operate vehicles weighing up to 55,000 pounds on public roadways. The MEO's are required to have commercial drivers' licenses and are subject to Department of Transportation ("DOT") regulations requiring, among other things, that they submit to drug and alcohol testing before they first perform "safety-sensitive functions" for the Company, and randomly thereafter.

When the Company selected James Smith to fill a vacant MEO position in March 1996, it subjected him to a random drug test in accordance with the DOT regulations. Smith tested positive for the chemical ingredients of marijuana. As a result, the Company suspended and later discharged him. Smith grieved, and his case went to arbitration. No one challenged the validity of the drug test, but the arbitrator ruled that discharge was too severe. He ordered the Company to reinstate Smith to the MEO job without back pay after a 30-day suspension, and directed that Smith participate in a substance abuse program and submit to random drug testing for the next five years.

Smith passed several random drug tests after that, but in June 1997—less than 15 months after his reinstatement—he again tested positive for the ingredients of marijuana. Again, the Company suspended and then discharged him. Again, Smith grieved and the case went to arbitration.

Although the second discharge case went to a different arbitrator, the outcome was similar. No one questioned that Smith had violated the Company's anti-drug policy, but the arbitrator ordered the Company to reinstate him once again to the safety-sensitive MEO position. This time, the arbitrator required that Smith sign a resignation letter that the Company could accept if he tested positive for drugs a third time. The arbitrator said he was convinced that a "personal/family problem" had caused Smith "this one-time relapse in drug usage" and that he was "confident" that, if Smith had misled him, "the grievant will

make another misstep with drug use and be caught." Pet. App. 28a.

Not content to wait for Smith to make another "misstep with drug use," the Company brought this action under Section 301 of the Labor Management Relations Act seeking to vacate the arbitrator's award. The district court instead granted the Union's motion to enforce the award. *Eastern Associated Coal Corp. v. United Mine Workers*, 66 F. Supp.2d 796, 805 (S.D. W. Va. 1998), *aff'd*, 188 F.3d 501 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1416 (2000). Based on a review of statutes, regulations and judicial precedents, the court found that there is "a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs," and "against the use of controlled substances by those who perform safety sensitive jobs." *Id.* at 804. The court concluded, however, that there is no public policy against *reinstating* employees to safety-sensitive positions after they have tested positive for drugs. *Id.* at 805. Consequently, the district court concluded that the public policy exception to the general federal policy of judicial deference to arbitration awards did not apply in this case. *Id.*

The court of appeals, in a per curiam order, affirmed "on the reasoning of the district court." Pet. App. 4a.

## SUMMARY OF ARGUMENT

As it relates to the employment of drug users, the issue presented in this case is a narrow, albeit extremely important one. The issue is *not* whether there is a well-defined, dominant public policy against drug use by persons performing safety-sensitive jobs. Everyone agrees that there *is*. The issue, rather, is whether that policy precludes a court from enforcing an arbitrator's award directing that a person who repeatedly has failed random workplace drug tests be reinstated to a safety-sensitive job—in effect, to wait and see whether, in the words of the arbitrator in this case, he "will make another misstep with drug use."

Pet. App. 28. *Amicus* EEAC submits that the order to reinstate Smith was as much at odds with public policy as were Smith's own actions in reporting to his safety-sensitive job with drugs in his system.

Judge Selya of the First Circuit perhaps put it best. Writing for that court in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 850 (1st Cir. 1997), he observed that "the same public policy which countervails the performance of safety-sensitive tasks while under the influence of drugs also encourages (and, in some cases requires) employers to implement and enforce drug-free workplace programs which include mandatory drug testing of those in safety-sensitive posts," and that "forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy." Thus, the First Circuit rejected the "wait-and-see" approach, *id.* at 849, correctly concluding that "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

Judicial deference to arbitration, although generally a good thing, must not be carried to the extremes the respondents advocate in this case—*i.e.*, to such lengths that it would require enforcement of an arbitrator's award that offends public policy, as long as the award does not actually violate "positive law" or compel conduct that is specifically illegal. Such uncritical deference would have disastrous consequences, not only for drug-free workplace programs, but also for other valuable programs that employers have adopted to meet their legal obligations and provide safe, nondiscriminatory work environments for their employees. For example, such unfettered deference could put courts in the untenable position of having to rubber-stamp arbitral awards restoring sexual harassers to positions in which they could resume preying upon co-workers and subordinates. As the Third Circuit has recognized, deference to arbitration in such

circumstances "undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442 (3d Cir. 1992).

Public policies against drug abuse and sexual harassment in the workplace depend upon more than just proscriptive rules. They also depend upon employers' effective implementation of programs to protect workers against the dangerous and discriminatory effects of infractions by others. In this case, the district court defined the policy against workplace drug abuse too narrowly. As a result, it upheld an arbitration award that undercut the program on which the employer's drug-free workplace effort depended. We urge this Court to make clear that drug-free and harassment-free workplace programs are themselves protected by important public policies, and that arbitration awards that subvert such programs are not entitled to judicial enforcement.

## ARGUMENT

### I. AN ARBITRATION AWARD DIRECTING THAT AN EMPLOYEE BE REINSTATED TO A SAFETY-SENSITIVE POSITION AFTER TWICE TESTING POSITIVE FOR DRUG USE VIOLATES A WELL DEFINED AND DOMINANT PUBLIC POLICY AND IS, THEREFORE, UNENFORCEABLE UNDER SECTION 301 OF THE LMRA.

#### A. The Policy of Judicial Deference to Labor Arbitration Awards Does Not Require Enforcement of an Award that Contravenes a Well Defined and Dominant Public Policy.

There is no dispute that judicial review of labor arbitration awards under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, is—and *should be*—narrowly limited. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior &*

*Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Nevertheless, courts properly can—and *should*—refuse to enforce such awards when the arbitrator's interpretation of a collective-bargaining agreement would violate some "explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests.'" *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)(quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *see also United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

### B. Existing Laws and Legal Precedents Establish a Well Defined and Dominant Public Policy Against Operation of Dangerous Machinery by Drug Users.

In this case, the district court, whose reasoning the Fourth Circuit adopted, conducted the requisite analysis of statutes, regulations and court precedents, and correctly concluded that there exists a "well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." *Eastern Associated Coal Corp. v. United Mine Workers*, 66 F. Supp.2d 796, 804 (S.D. W. Va. 1998). The court also correctly recognized the obverse—*i.e.*, that "a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." *Id.* From a review of the petition and the supporting and opposing briefs filed with this Court, it appears that there is no dispute about the validity of the district court's findings that these interrelated public policies exist, and that they are "well defined and dominant" within the meaning of the *W.R. Grace* and *Misco* decisions cited above.[2]

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[2] As the district court correctly noted, 66 F. Supp.2d at 804, numerous other courts also have recognized these "well defined and dominant" public

The importance of these undisputed public policies can scarcely be overstated. As the First Circuit has said:

> At this point in American history, few elements of public policy command the consensus that attaches to the policy against the use of controlled substances by those whose work potentially imperils others. Judicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing a well defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs.

*Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997).

Also uncontested are the basic facts to which these important public policies must be applied in this case. There appears to be no question that the workplace drug test the Company required employee Smith to take was a valid test, or that DOT regulations required that the test be given randomly to employees in the Company's safety-sensitive MEO positions. Nor is there any question that Smith, on at least two occasions within about 15 months, reported to work as an MEO in such condition that he was unable to pass that test.

Thus, the narrow but vital issue now presented to this Court boils down to this: Can the arbitrator's award requiring the

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policies against performance of safety-sensitive jobs by employees under the influence of drugs, and against use of controlled substances by those who perform safety-sensitive jobs. *E.g.*, *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 847-49 (1st Cir. 1997); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1292 (3d Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1194 (3d Cir. 1993); *Union Pac. R.R. Co. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 361-62, 364 (3d Cir. 1993); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 252-53 (5th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988).

Company to reinstate Smith to the safety-sensitive MEO job after he repeatedly had failed the drug test be reconciled with the "well defined and dominant" public policies that the district court correctly identified? The district court concluded that the award *could* be reconciled with those policies, because "the DOT Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use." 66 F. Supp.2d at 804-5. We submit, however, that in so holding, the court took too narrow a view of the policies involved. It failed to follow those policies through to their logical conclusion, as discussed below, and thus ultimately reached a result that is at odds with both public policy and law.

### C. A Positive Result on a Random Workplace Drug Test Requires the Conclusion that Reinstatement of the Tested Employee to a Safety-Sensitive Position Would Be Contrary to Public Policy.

The district judge's principal error in this case was in failing to recognize that the public policies he had correctly identified—*i.e.*, the policy against performance of safety-sensitive jobs by employees who use drugs, and the corollary policy against use of drugs by employees who perform safety-sensitive jobs—do not stand in isolation. Rather, they are dependent on the development, implementation, and effective enforcement by employers of programs to discourage workplace drug use and protect employees and the public against the dangers of drug-related workplace accidents. These vital programs are undermined and eviscerated when a worker with a history of drug abuse is reinstated to a safety-sensitive position.

The First Circuit has recognized the interdependence of drug-free workplace *policies* and the *programs* essential to their effectuation:

> The pertinent public policy dictates not only that employees refrain from performing safety-sensitive jobs while

> under the influence of drugs, but also that employers develop (and enforce) programs designed to discourage such activity. . . . [T]he same public policy which countervails the performance of safety-sensitive tasks while under the influence of drugs also encourages (and, in some cases, requires) employers to implement and enforce drug-free workplace programs which include mandatory drug testing of those in safety-sensitive posts.

*Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d at 849-50. Consequently, that court concluded:

> Consistent with this enhanced understanding of the discerned public policy, we hold that forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy. It makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive.

*Id.* at 850. Several other circuit courts have reached the same correct conclusion and have, therefore, refused enforcement of arbitrators' awards ordering reinstatement of employees who had failed drug tests. *See* cases cited at footnote 2, *supra*.

As the First Circuit observed, the public policy that encourages (and in some cases, requires) employers to adopt and enforce effective drug-free workplace programs is incompatible with a "wait-and-see" approach. *Id.* at 849. In contrast, the arbitrator in this case was willing to expose employee Smith, his employer, his co-workers and the public to the risk that Smith would take a third "misstep with drug use" if reinstated to his job operating a 55,000 pound vehicle on the public roads. As the First Circuit observed, that approach is unacceptable because of the likelihood that the "misstep" will come to light through a tragic accident:

> The notorious mishap involving the Exxon Valdez, which produced vast environmental devastation, highlights the core problem associated with this "wait-and-see" approach. If we have learned anything from such catastrophes, it is that employers must act affirmatively to avoid drug-related accidents rather than wait passively for such accidents to happen.

*Id.* Thus, as that court recognized, it follows that "the well defined and dominant public policy which we have identified does not require an employer to await the occurrence of an accident before discharging an employee who tests positive for drug use." *Id.* It also follows, we submit, that an arbitrator's award directing that an employee who repeatedly has failed random workplace drug tests be placed back in a safety-sensitive job to wait and see whether he will make another "misstep with drug use" is contrary to public policy and should not be judicially enforced.

## II. A RULE REQUIRING JUDICIAL ENFORCEMENT OF ANY ARBITRATION AWARD THAT DOES NOT VIOLATE POSITIVE LAW OR COMPEL CONDUCT THAT IS SPECIFICALLY ILLEGAL, EVEN IF IT CONTRAVENES AN IMPORTANT PUBLIC POLICY, WOULD HAVE DISASTROUS IMPLICATIONS FOR MANY ESSENTIAL EMPLOYER PROGRAMS, INCLUDING HARASSMENT-FREE WORKPLACE PROGRAMS, AND SHOULD BE REJECTED BY THIS COURT.

Insofar as it is premised on the notion that a labor arbitrator's award is entitled to judicial enforcement even if it offends public policy, as long as it does not actually violate "positive law" or require conduct that is specifically illegal, the decision below carries the fundamentally sound idea of deference to arbitration too far. While a court should not substitute its judgment for an arbitrator's based on "an assessment of 'general considerations

of supposed public interests,'" *United Paperworkers Int'l Union v. Misco*, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766), neither should a court allow itself to be used as an instrument to subvert important public policies by weakening or countermanding mechanisms essential to their implementation.

Such unthinking deference to arbitration awards would jeopardize not only drug-free workplace programs, but also other workplace programs adopted by employers to effectuate important public policies. Of particular concern to the EEO-conscious employers represented by this *amicus* is the impact that such extreme deference to arbitration awards could have on programs to rid the workplace of unlawful harassment.

Like the public policy against allowing persons with a history of drug abuse to work in safety-sensitive jobs, there clearly exists a well-defined and dominant public policy against allowing persons with a history of sexual or racial harassment to work in positions in which they can prey upon vulnerable co-workers, subordinates and others. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). *See also* EEOC Policy Guidance: Sexual Harassment, N-915-050, *reprinted in* EEOC Compl. Man. (BNA) N:4031 (March 19, 1990). Indeed, the EEOC Guidelines make employers liable for sexual harassment between co-workers when the employer knew or should have known of the harassment and failed to take "immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d) (1999).

This Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), added strong encouragement to employers to adopt harassment-free workplace programs to meet their obligations under Title VII. Essential ingredients of such programs include a policy against unlawful harassment, training to ensure that employees understand the policy's meaning and consequences, and follow-up mechanisms to ensure that complaints

are investigated promptly and appropriate steps are taken to prevent recurrence of harassment when it is found.

Reinstatement of an employee who has committed egregious or repeated acts of sexual or racial harassment directly subverts public policy by impairing the environment in which innocent co-workers and subordinates must work. "[I]t subjects the victim of past harassment to the potential of on-going abuse and subjects the employer to continuing liability." Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 287-88 (1998). It also sends a signal to employees that the employer's anti-harassment policies are not to be taken seriously. Thus, reinstatement of such an individual can have devastating effects on the credibility and effectiveness of an employer's harassment-free workplace program.

Employers' concerns that excessive deference to arbitration could undermine their harassment-free workplace programs are not merely speculative, but are based on actual experience reflected in several reported court decisions. For example, in *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999), the court upheld an arbitrator's decision to reinstate an employee who repeatedly had sexually harassed a co-worker. The court reasoned that the general policy against sexual harassment was not a sufficient basis to deny enforcement of the reinstatement award.[3]

The fallacy that has led some courts to enforce arbitration awards reinstating sexual harassers is similar to the fallacy that

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[3] At least two other circuits have enforced arbitrators' awards reinstating employees discharged for violating their employers' policies against sexual harassment. *See Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685 (7th Cir. 1992); *Communications Workers of Am. v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989).

led the district court in this case to enforce an award reinstating a drug-abuser to a job driving 55,000 pound vehicles on the public roads. The problem lies in failing to recognize that effectuation of the public *policy* against workplace harassment (or drug use) depends on effective implementation of the employer's harassment-free (or drug-free) workplace *program*. An award that subverts the employer's *program* inevitably undermines the public *policy*, as well.

The Third Circuit noted this interrelationship between policies and programs in the context of sexual harassment in *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992), when it refused to enforce an arbitration award ordering reinstatement of an accused sexual harasser without a determination that the harassment did not, in fact, occur. The court observed that an award that "would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred" was contrary to public policy, because it "[did] not discourage sexual harassment" but "[i]nstead, . . . undermine[d] the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Id.* at 1442. *See also Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (arbitrator's award directing reinstatement of sexual harasser held unenforceable as against public policy because, "[a]bove all, it prevents [the employer] from carrying out its legal duty to eliminate sexual harassment in the work place.").

Accordingly, we urge this Court to reject the extreme position advocated by the respondents in this case—*i.e.*, that deference to labor arbitration requires enforcement of any arbitration award that does not, itself, actually violate "positive law" or compel unlawful conduct, even though the award may offend a well defined and dominant public policy that is based in law.

## CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed, and this case should be remanded with instructions to the district court to grant the employer's petition to vacate the arbitration award.

Respectfully submitted,

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